

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1140

To Be Argued By
WILLIAM B. LAWLESS

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID STIRLING, JR., WILLIAM G. STIRLING,
HAROLD M. YANOWITCH, EDWIN SCHULZ
and RUBEL L. PHILLIPS,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS DAVID
STIRLING, JR. AND WILLIAM G. STIRLING

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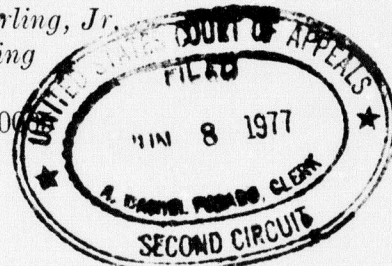


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ABBREVIATIONS

References to the Joint Appendix are preceded by the letter "A", followed by the number of the page to which reference is made, e.g., "A 301". References to the Indictment are preceded by the abbreviation "Ind."

References to the Exhibit Volume are preceded by the letter "E", followed by the number of the page to which reference is made, e.g., "E 410".

References to Government Exhibits and Defendants' Exhibits not reproduced in the Exhibit Volume are preceded by "GX" and "DX" respectively, e.g., "GX 580", "DX 42".



UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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DAVID STIRLING, JR., WILLIAM
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PHILLIPS,

Defendants-Appellants.

BRIEF OF APPELLANTS DAVID STIRLING,
JR. AND WILLIAM G. STIRLING

Statement

David Stirling, Jr. and William G. Stirling
appeal from a judgment of conviction entered on March 11,
1977 in the U.S. District Court for the Southern District
of New York, after a trial before the Hon. Marvin E.
Frankel and a jury. Defendant was convicted on nine
counts of an indictment charging fraud in the sale of
securities (Section 17 of the Securities Act of 1933, 15
U.S.C. §77q(a)), false statements in the filing of a 1971

Registration Statement for the sale of Stirling Homex preferred stock (Section 24 of the Securities Act of 1933, 15 U.S.C. 77x), mail fraud (18 U.S.C. §1341), and conspiracy to violate the foregoing statutes (15 U.S.C. §371). All counts were predicated upon specifications set forth in paragraphs 10 through 16 of the indictment.

QUESTIONS PRESENTED

1. Did the trial court deprive defendants of rights guaranteed to them by the Fifth Amendment, and thus deprive them of a fair trial, by its refusal to strike a specification, common to all counts of the indictment, alleging the same acts and transactions for which defendant David Stirling had previously been indicated and punished in the Western District of New York?
2. Did the trial court err in charging the jury that, in a case where defendants alleged reliance upon expert opinion, such reliance did not afford any defense if, without so intending, defendants did not make full disclosure of all matters which the expert deemed essential to his opinion?
3. Did the trial court err in failing to withdraw certain specifications, not supported by sufficient evidence and/or barred by the Fifth Amendment, from the jury's consideration?
4. Did the trial court deprive defendants of a fair trial by reason of its gratuitous suggestion of perjury during its charge, its exclusion of defense witnesses, and its limitation of the cross-examination of prosecution witnesses?
5. Did the court improperly deny defendant William Stirling's motion for acquittal, and was that defendant denied a fair trial by reason of the prosecution's improper rebuttal summation?

Statement of Facts

David Stirling and his younger brother William were, respectively, the chairman of the board and president of Homex from the time of its first public offering, on February 19, 1970 until their resignations as officers and directors on June 29, 1972. On July 12, 1972, Homex filed a petition for reorganization under Chapter X of the Bankruptcy Act. The indictment upon which defendants were tried alleges fraud in connection with Homex's registration statements for the sale of its common and preferred stock and its interim filings with the Securities Exchange Commission.

Prior to Homex, the Stirling brothers had been construction contractors in upstate New York since the early 1960's, and had achieved considerable success in developing residential complexes (A 435-37). As their business grew, they became increasingly dependent on the financial advice of Harper Sibley, an experienced financier who invested in several of these projects (A 437a). Neither of the Stirling brothers had proceeded past the tenth grade, and the record is devoid of any claim that they possessed financial expertise (A 436, 444).

Traditionally, apartments are constructed over a period of months by on-site construction, sometimes referred to as "stick-building". In the late 1960's, while inspecting a plant that manufactured trailers, the Stirlings conceived of the possibility of mass producing prefabricated modules on a factory

production line, which could then be shipped to the site and combined to form single or multi-family dwellings (A 438-39). With Sibley and their late father, the Stirling brothers incorporated Homex in Delaware, in August 1968 (E 5). The Stirling brothers themselves contributed assets to the new company worth several million dollars, the value of which was never contested at trial (A 440-41).

Initially, the vast majority of Homex sales of modules were made to residential projects which were being developed by Sibley and the Stirling brothers (E 5). However, as the Johnson administration's housing program pumped vast sums into slum clearance projects, it soon became apparent that Homex's future was in manufacturing modules rather than developing residential projects, as David Stirling began to divest Homex of its real property holdings (A 443). At this time, the prospects for Homex's success appeared bright: the modules had been highly praised by governmental officials, including HUD Secretary George Romney, and the demand for modules was so great that private developers were paying for them well in advance of their production (E 214).

Homex's first public offering, 1,175,000 shares of common stock, was underwritten by R. W. Pressprich & Co. (E 3). Prior to that sale, the Stirlings had realized that they and Harold M. Yanowitch, their general counsel and vice president since September 1969, did not have the expertise to handle the unique accounting, labor and SEC issues raised by a new company in a new

industry.* As its accountants, Homex retained the firm of Harris, Kerr, Foster & Co. ("HKF") who remained its auditors until Merrill Lynch (underwriter for Homex's issue of preferred stock in July 1971) requested the retention of a "Big Eight" firm, at which point Peat Marwick Mitchell & Co. ("PMM") replaced HKF (A 353). Homex also retained Professor Joseph A. Mauriello of the New York University School of Business Administration as a consultant throughout this period (A 347a). As its securities expert, Homex retained the firm of Shea, Gould, Climenko & Kramer, and particularly its partner Allan W. Kramer, Esq. (A492a). As its labor relations counsel, Homex had noted labor expert Theodore W. Kheel, Esq., who was also a member of its board of directors (A 442). In addition to this array of experts, Homex hired in-house counsel experienced in securities regulation, government contracts, and the law and practices relating to governmental housing development programs (A 472). As director of its southern operations, Homex hired Rubel L. Phillips, Esq., a prominent attorney who had formerly been Republican candidate for Governor of Mississippi (A 475).

After a six-week jury trial, the trial judge charged the jury that the indictment and proof could be condensed into essentially four factual areas: (1) the three land trans-

*One of the more fundamental problems was the manner in which sales could be accrued in an industry where the percentage-of-completion method applied on the stick-building trade was useless, because the module was completed before it ever reached the site.

actions involving Homex's Hollyrood Park property, (2) the misdescription of its relationship with the United Brotherhood of Carpenters and Joiners of America, (3) the failure to report the reassignment of modules and cost overruns, and (4) the dubious nature of the receivables claimed with respect to the Greater Gulf Coast Housing Development Authority (A 568-579).

The evidence adduced with respect to each of these areas, as they related to the Stirlings and as presented by the prosecution's own witnesses, shall now be examined.

The Land Transactions

The major portion of the case against the Stirling brothers and Yanowitch was based upon the sale of three pieces of property in Clay, New York, adjacent to or near an apartment complex known as Hollyrood Park. The Stirlings had a 12% interest in Hollyrood Park Associates, whose general partner was Peter Thun (A 381-82). As the Stirlings became increasingly active in the modular housing field, David sought to divest all of their real estate holdings, including the properties which had been contributed to Homex (A 443). During 1969 and 1970, Thun purchased an adjacent plot of 16 acres for a price of \$325,000; Raseac Realty, a corporation owned by two of Yanowitch's former clients and one of their friends, bought an adjacent parcel of 15 acres for \$425,000; and 57 & 31 Corporation purchased a nearby parcel of 145 acres for \$2.1 million.

At trial, the government attempted to demonstrate that all three sales were really sham transactions at inflated prices,

affected by side promises which had not been disclosed in Homex's filings with the SEC. With constant reference to the fact that in each case the purchasers were shell corporations, that the properties were mortgaged, and that the down payment was either 10 or 20 per cent of the purchase price, the prosecution sought to prove that these were phony sales, despite the fact that these are common attributes of most transactions involving undeveloped real property.

The testimony educed at trial -- from the government's own witnesses -- squarely contradicted the sinister connotations contained in the indictment. All of the participants testified that these were arm's length transactions, that the sale price was not inflated, and that the so-called "side agreements" were either unenforceable or non-existent. Notwithstanding this failure of proof, the trial court refused defendants' motion to strike these charges, and thus permitted the jury of laymen to consider whether a real estate transaction was a sham sale simply because the purchaser was a shell corporation.

(a) Raseac Realty

In June 1969, while still in private practice and prior to Homex's registration, Yanowitch had spoken to three of his clients, Dr. Morris Shapiro, Caesar Falcone, and Donald Barbato, about the possible acquisition of approximately 15 acres immediately to the east of Hollyrood Park (A 213). Falcone and Shapiro, both government witnesses, were experienced real

estate investors, and Shapiro had asked Yanowitch to look out for possible investment opportunities (A 213, 227). Because he was outside counsel to Homex, Yanowitch told them that they would need independent counsel to represent them if they decided to buy the property (A 214). The purchasers were represented in the transaction by Gerald Beckerman, Esq. and, since Yanowitch had left private practice prior to the consummation of the sale, Homex was represented in the transaction by John Garrity, who was not called as a witness.

At a meeting with Shapiro, Falcone and Barbato, Yanowitch allegedly told them, in the presence of David Stirling, that if the venture did not work out -- the property was considered as the possible site of a shopping center -- he would find someone to buy the property from them (A 215).^{*} At no time did Barbato, Falcone or Shapiro claim that this commitment was made on behalf of Homex, or even David Stirling individually (A 221). Indeed, when Beckerman drafted an agreement which included a commitment that Kabeth, the Homex subsidiary which owned the property, would take back the property in the event that a zoning variance could not be obtained, he was flatly refused (A 228). Beckerman, who appeared as a government witness, told his clients that the absence of a written agreement rendered any "guarantee" unenforceable, but -- despite his

^{*}Only Barbato and Falcone claimed that David Stirling was present at the time of this representation. Dr. Shapiro denied that he had any dealings with David Stirling (A 224-25). No one claimed that William Stirling had any part in this transaction.

recommendation that his clients refuse to buy the property -- his clients rejected his advice and went ahead with the deal (A 229, A 230).*

Although the prosecution maintained that the initial Raseac transaction was a sham effected by a secret promise, the testimony of its own witnesses indicates an arm's length transaction in which the purchasers were paying fair value. The only evidence directly bearing upon the value of the land was an independent appraisal, which estimated its value at \$403,650, just \$22,000 less than the purchase price(1525; GX 95c). Moreover, the government's own witnesses confirmed that the alleged indicia of fraud -- a shell corporation as purchaser, a down payment of \$80,000 and a mortgage securing the balance of the purchase price -- was typical of a transaction involving undeveloped real property (A 222, 223, 226; cf. A 248a).

By February 1971, Falcone had grown dissatisfied with the property, and neither he nor his partners wished to continue making the mortgage payments (A 267-69). A zoning restriction inhibiting development of a shopping center had not been removed, and Falcone asked his attorney (and Yanowitch's former law partner), Bernard Frank, Esq., to contact Yanowitch and tell him to find someone to take over the property (A 268, 270). Frank, called by the prosecution under a grant of immunity, testified

*At trial, Yanowitch denied having given Raseac any promise -- on his own behalf or Homex's -- of getting them out of the transaction if the land proved unsuitable for a shopping center (A 471) The possibility of such a guarantee is further discounted by Shapiro's own testimony that Yanowitch did not even assure the purchasers that Gulf Oil would pick up the option on a corner lot, which it ultimately did in January 1970 (A 218-20).

that when he spoke to Yanowitch in March 1971, Yanowitch told him that he had said he would "try" to get them out of the property in a year, but that he had been preoccupied with other matters (A 270-71, E 407). He also stated that "the Stirlings were really criticising him because here he had put together a deal with respectable businessmen a year, a year and a half ago and it was falling apart. . ." (A 271). Frank further testified that Yanowitch then asked him whether he and his partner, John Garrity, would be interested in buying the property from Raseac (A 272-73).

At first, Frank told Yanowitch that he and Garrity had not been having a good year, and that they probably could not come up with the cash necessary to close the deal, and Yanowitch suggested that the deal was so advantageous that it was worth borrowing money (A 273-74). After Frank discussed the deal with Garrity, they obtained a loan from Central Trust, which had previous dealings with the firm and had already issued a mortgage to Homex on the property, and bought the property from Raseac in March 1971 (A 274, 276-77, 286-90). Despite the prosecution's attempt to depict the sale as a sham transaction, Frank testified that he and Garrity would not have entered into the transaction -- regardless of the past association with Yanowitch -- if the property did not seem like a good investment (A 280, 281-82).*

*At trial, Frank had testified that part of the "inducement" for the transaction had been Yanowitch's statement that Homex would, should the occasion arise, release several acres of the property from its mortgage so that Frank and Garrity could generate cash

[Footnote continued on following page]

During the course of his direct examinaion, Frank suggested that when he had initially mentioned the bad year which he and Garrity had been having, Yanowitch said "Don't worry about that, we're going to be sending you so much legal business that this investment will never be a burden on you and [Garrity]." (A 274-75). While billings to Homex from the firm of Garrity & Frank subsequently increased, the connection between the Raseac transaction and their billings was never established: Frank also testified that all of the services for which Homex was billed were actually performed, and that there was nothing whatsoever spurious about Garrity & Frank's charges (A 296-97, 300-06). In answer to the only question which bore directly upon the prosecution's attempt to depict a pay-off, Frank -- an immunized witness called by the government -- flatly stated that Yanowitch had never "directly or indirectly" told him to pad his bills (A 306).

As to the Stirling brothers, Frank stated that he never discussed either the Raseac transaction, his firm's hourly rates, or the amount of its bills with either of them (A 307). Indeed, the only context in which the Stirlings were ever mentioned was the statement, attributed to Yanowitch, that they were "criticizing [Yanowitch] because here he had put together

[Footnote continued from preceding page]

to make periodic payments on the Homex mortgage (A 272-73). On cross-examination, Frank admitted that no such release had been provided by Homex or Yanowitch, and that he and Garrity did not rely upon any such representation (A 283-85)..

a deal with respectable businessmen. . .and it was falling apart" (A 271; see also A 310) -- a criticism which would hardly have been made with respect to a sham transaction.

Moreover, the entire Raseac transaction was effectively discounted by William Murray, the member of Peat Marwick Mitchell who was in charge of the Homex engagement. Testifying as a government witness, Murray stated that he had not discussed these transactions with either the Stirlings or Yanowitch, and that "the only fact that might have concerned me [about the propriety of the Raseac receivable] was the increased legal fees, whether these things were in fact as a result of increased activities or just inflated billings." (A 402, 407-08). Since Frank had himself testified that the billings were bona fide, there was no reason to question the transaction.

(b) 57 & 31 Development Corporation

In December 1970, Harold Wynn and William Grago, partners in the Empire Pipeline Corporation, and Carmine Grasso, their attorney, met with David Stirling to discuss their possible acquisition of acreage at the junction of Routes 57 and 31 in Clay, New York. Actually, the impetus for this meeting came from Wynn, who had heard a conversation in which Robert Congel, the leading shopping center developer in central New York, had expressed an interest in buying the property (A 243-47). Empire

Pipeline had been working on several Homex projects, including land contiguous to the acreage, and Stirling "felt that we were the logical ones to acquire this particular piece of property" (A 232).^{*} A 30-acre portion of the property was then the subject of a condemnation proceeding, and Stirling told them that he anticipated -- as it turned out, correctly -- that the State would award as much as \$1 million for that property (A 234, 236, 248, 250). Stirling stated that the property was worth at least \$2.1 million, and that Kabeth would sell it to them for that price because Homex "was disposing of commercial properties [because] they wanted to be known as housing manufacturers rather than real estate developers. . . ." (A 232).

Wynn stated that, while the price was fair, he, Grago, and Grasso could not handle a \$2 million deal (A 235, 251). Stirling explained that the anticipated condemnation award could go to the reduction of the purchase price, and that he would permit a 10% (\$210,000) down payment and no payments of principal

^{*}As to the charge that Empire Pipeline "had derived a material portion on its past revenues" from Homex (Ind., ¶1, 2 [A 14-15]), the testimony was equivocal. While Wynn testified that 40% of Empire's volume came from Homex, his partner stated that, while it had previously amounted to that 25%-40%, by 1970 "it was not a great deal" (A 231, 249). Significantly, the government produced as documentary evidence to support its implied claim that Empire was financially dependent on -- or even expected future revenues from -- Homex. Grago himself noted that pipe contracting companies normally had customers with as much as 25-40% of their trade when projects are actually under construction (A 258).

for five years (A 236). Wynn testified that when he suggested that for the time being they could not come up with \$210,000 in cash, Stirling also offered to arrange financing for them (A 236). Wynn and his colleagues discussed the deal and "we concluded that this would be a very profitable undertaking. . .")A 237). The deal was accepted that day by the three of them without even a private conference between them (A 237). The anticipated condemnation award was assigned to the First National Bank of Rochester as security for repayment of the mortgage.

At trial, the government contended that "such 'sale' involved side promises and agreement given to the buyers including guarantees against losses" (Ind., ¶12 [A 14-15]). Their own witnesses, however, failed to provide any support for a guarantee from Homex. Thus, Wynn testified that after the bargain had been struck, "[David] extended his hand to me and said, "Bud, you won't get hurt by this deal" (A 237a). At no time did Wynn ever claim that David Stirling had "guaranteed" anything. His partner, Grago, who claimed that Wynn had done all the talking for them, recollected that "David said there could be no corporate guarantees but he would personally guarantee that we would not be hurt, and we shook hands on that", (A 252, 256-57).*

*It is noteworthy that Grago had taken the witness stand after having had the benefit of hearing Wynn discuss his testimony with Grasso over the telephone (A 254-56). Significantly, attorney Grasso -- who would certainly know the difference between a guarantee and a handshake -- was not called by the prosecution.

If Grago or Wynn ever thought that there was a guarantee, the subsequent financing of the transaction must have relieved them of that misconception. Before the First National Bank of Rochester would issue 57 & 31 Development Corporation a \$250,000 loan, it required their personal guarantees on the note (A 265-66; F 378-79, 394-406). While the indictment charged that 57 & 31 was "a financially weak shell corporation", the net worth of Grasso, Grago and Wynn amounted to \$981,719 as of the December 23, 1970 contract date -- four times that amount of the note and roughly equivalent to the sale price of the land (less the anticipated condemnation award) (A 263-64; GX 56).

After the contract had been prepared, Yanowitch asked Reuben Davis, a Homex attorney, to call Professor Joseph Mauriello, of the New York University School of Business Administration, who served as Homex's consultant on accounting matters. According to Davis, who testified as a government witness, Yanowitch asked him to state the broad outlines of the contract and to get his opinion as to whether it was a bona fide sale (A 312-14). Significantly, Davis did not claim that any instruction had been given to him to withhold information from Mauriello, and, as the lawyer who drafted the contract, he gave a full report to Mauriello (A 311, 312-14; GX 580 [909077]). During

January and February, 1971, Mauriello and, after the retention of Peat Marwick, William Murray, reviewed the transaction and concluded that it could be recognized as income (A 348-60). There is no evidence that the Stirlings or Yanowitch ever withheld any information from the accountants, or directed anyone else to withhold information.

During this period, Davis had been told by Mauriello that the five-year deferral of payment of the principal would cause the imputation of interest, thereby reducing the income to be recognized on the sale (A 315, 398-99). In late January 1971, the agreement was amended to provide that 57 & 31 would make annual payments of \$50,000 on the principal (A 238-42; GX 56). Wynn testified that David Stirling had assured him that he would not have a cash flow problem because Homex work on adjacent projects would be picking up and, as the Clay area developed commercially, he would be able to sell off enough of the land to handle the principal payments (A 242).^{*} There is no testimony that Stirling -- who, according to Grago, had never offered a guarantee from Homex -- in any way promised to send Homex work to Empire to help it pay for the property.

As amended, the 57 & 31 transaction was disclosed and reported in the Merrill Lynch preliminary prospectus (A 413-19;

^{*}Grago and Wynn made the first principal payment from funds derived by having Empire Pipeline bill Homex directly, rather than through Empire's subsidiary, Leasing Equipment Company (A 253-53a; GX 942). Grago testified that there was nothing surreptitious or devious about this billing, and that it represented payment for services which had actually been performed for Homex (A 259-61, 264a-264b).

DX 759). It was not included in income at all in the final Merrill Lynch prospectus (E 81).

At trial, Murray and Mauriello testified that they had not known of Homex's assignment of the condemnation award to First National, and that they would have changed their respective opinions had they known about it (A 366, 367, 403-06). Of course, there was no testimony indicating that such information was withheld from them, nor that David Stirling, who signed the Homex representation letter, was aware of the fact that the accountants would consider such an assignment to a third party as an "indirect relationship" between Homex and 57 & 31 (A 406).

(c) Kece Associates

Prior to the formation of Homex, the Stirlings had sold the Hollyrood Park complex to a limited partnership headed by Peter Thun, and retained a 12% interest in that partnership (A 381-82). As part of the acquisition, the partnership had retained a right of first refusal with respect to the adjacent parcels, which the Stirlings subsequently conveyed to Homex subsidiaries (A 392, 446-47). In May 1969, David Stirling had advised Thun that the parcels were being offered for sale, and inquired as to whether he would be interested in purchasing them. Thun had a real estate consultant inspect one parcel as a possible shopping center, and told Stirling that he was not interested in it (A 383-84).^{*} The other parcel, however, was highly desirable, both as a possible "third phase" to Hollyrood Park and, equally important, as protection for the \$7 million which

^{*}This parcel was subsequently transferred to Raseac Realty (see supra, pp. 8-13).

Thun had already invested in the Hollyrood complex: "Hollyrood was planned as a parcel including that land and some of the access roads to some of the [existing] buildings run over that land, and the boundary to that land runs just a few feet from the front door of several of the buildings." (A 384, 393-94).

Thun, called as a prosecution witness, testified that in that same conversation he had asked how much it would cost to put 330 Homex units on the parcel, and Stirling told him that he could not answer the question because no price list had been published (A 384-85). Thun then said that because he could not estimate the cost of developing the property without the price of the modules, "the purchase of the land would have to be on a basis whereby it had more the characteristics of an option on the [raw] land as far as I was concerned." (A 385). As the transaction was ultimately structured, Kece Associates, Ltd. purchased the property for \$325,000, making a cash down payment of \$32,500 and giving a mortgage for the balance of the purchase price, secured only by the property itself (A 386; GX 74). In September, three months after the closing, Kabeth sent a letter of intent to Riverbend Estates, Inc., another Thun corporation to which the parcel was transferred from Kece, in which it agreed to provide 330 units for installation on the property at published prices conditioned upon financing (A 387; E 380-81). After

this deal was closed, Thun stated, he told his partners in Hollywood Park -- but not the Stirlings -- that the developed land would be sold to the partnership for what it had cost him (A 387-389).

In its closing argument, the prosecution claimed that this sale was really an option, and that the Kabeth letter was a "letter of intent [and] part and parcel of, despite Mr. Stirling's testimony otherwise, the sale of that land to Peter Thun. . ." (A 551). The facts -- from Thun's own testimony -- rebut any inferences supporting the charge.

To begin with, Thun himself stated that the transaction "was an absolute outright purchase of [the property]", and that, when he bought it in May 1969, he intended to develop it and add it to Hollywood Park (A 395). Indeed, Thun's position was such that, even if he did not put up any modules, he would have secured its purchase "because of their adjacency to [my] large investment" -- \$7 million -- "and because that which was put on them would have definitely affected the character of [Hollywood Park] itself." (A 394). Moreover, the fact that the mortgage could not be enforced against Kece Associates was meaningless: Kece was never shown to have any assets, Thun had ample reason to continue the mortgage payments, and the land itself had been appraised at \$310,000 (E 382). At the time that the sale was made in May 1969, the balance due was amply secured by the land itself. Similarly, the alleged

"obligation" to put 330 modules on the property is belied by both the document itself and the surrounding circumstances. The Kabeth letter was not even executed until more than two months after the deed had been transferred to Kece (Bill of Part., p. 14 [A 109]). Moreover, the terms of the letter amount to no more than an agreement to agree, on 330 modules which had not been designed or priced (E 381-82).

The prosecution devoted most of Thun's testimony to establishing the proposition that, despite having confirmed the validity of Kece's debt to Peat Marwick, the mortgage payments were induced by transactions in which David Stirling transferred his remaining interests in certain limited partnerships to Thun. In the end, the only thing which the prosecution had established was that a September 1970 payment was made by a check from Jack Doerge, who had bought part of both Stirlings' and Thun's stock in Mobile Towns, Inc. (A 396-97). Curiously, Thun's testimony on this point -- "Q. Did you take out your checkbook and write a check for \$90,000? A. No, I did not." (A 396) -- ended up in the prosecution's summation as:

"Mr. Thun, did you ever take out your checkbook and pay \$90,000 or \$23,000 or two cents against this debt?

"He said no, he didn't. That speaks volumes about whether that was truly a receivable that was going to be collected. . . ." (A 555-56).

It is submitted that the prosecution's confusion about its witness's testimony "speaks volumes" about whether the jury truly understood the issues involved in the real estate transactions.

Stock Purchases for Union Officials

In June 1969, Homex entered into a labor agreement with the United Brotherhood of Carpenters and Joiners of America (A 448). All of the government witnesses testified that this was an arm's length agreement fairly negotiated (A 192, 484-85). When Homex first went public on February 19, 1970, the importance of satisfactory labor relations was prominently mentioned on the third page of the prospectus and the possibility of adverse labor relations was explicitly set forth:

"Freedom from work interruptions as a result of labor problems is important to the continued success of the Company's business. Although the Company believes that the above-mentioned agreements should contribute to the continuation of its present satisfactory labor relations, it can give no assurance that the Company and its subsidiaries will be free of labor problems in the future." (E 51-52) [emphasis added]).

The prosecution charged that a similar statement in the prospectus (E 90) failed to disclose that David Stirling, after the initial public sale of Homex stock had arranged for the payment of loans made to various union officials by the Central Trust Company of Rochester (Ind. ¶16 [A 17]). Defendants' pretrial motion to strike this count, pursuant to F.R.Cr.P. 7(d), had been denied (A 24-32).^{*} At no time has the government ever sought to explain how a registration statement highlighting the transience of amicable labor relations could mislead anyone.

^{*}Before trial David Stirling and Yanowitch had pleaded, respectively, guilty and nolo contendere to a misdemeanor in the Western District of New York involving violation of the Labor Management Act in connection with these purchases. Prior to trial, they had moved to vacate their pleas and no decision has yet been issued on that application. Over strenuous objection, the trial court permitted the prosecution to use those previous pleas during the cross-examination of Stirling (A 459-68).

Kenneth Langone, a former president of Pressprich, called as a government witness, testified that shortly prior to the offering -- and six months after the labor agreement -- David Stirling had asked for the inclusion of certain individuals among the hundreds on the original stock issue list, and had informed him that "these were the people that were representatives of the labor unions" (A 175, 180). Langone told Stirling that it was not "appropriate", and David Stirling dropped the subject (A 175-76). In point of fact, no Carpenters' Union official ever purchased Homex stock at the original issue price of \$16.50 per share.*

Langone testified that in March 1970, David Stirling had asked him whether the union officials had received their stock, was told that they had not, and then asked whether there would be anything improper if they were to purchase stock at the after-market price of \$34 per share. Langone claims to have told Stirling that it would be no problem, and to have proceeded -- at Stirling's directions -- to purchase the stock at that price (A 177-79). Charles Marshall, then an officer of Central Trust Company (and later president of United States Shelter Corporation, a Homex subsidiary) claimed that David Stirling had arranged loans by Central Trust to finance these purchases, and had personally guaranteed their repayment at the time that the loans were made (A 325; E 418 [forged guarantee letter]).

*Notwithstanding this uncontested fact, the prosecution introduced an internal legal memorandum which dealt with the question of whether Homex could legally offer stock subscriptions to labor union officials, bank employees, and government employees at the original issue price (GX 710). Significantly, there was ample evidence at trial that such persons had themselves initiated such inquiries. See, e.g., A 187-89 [Ruggiano]; A 449, 450.

David Stirling denied having either requested the stock purchases or guaranteed the loans (A 454, 457). Moreover, he noted that Homex director and labor expert Theodore Kheel was intimately familiar with every aspect of Homex' labor relations, had told him that such purchases would not have been unlawful -- an opinion he held "very strongly" -- and Kheel himself designated various union officials to receive Homex stock, at least one of whom, Joseph Lane Kirkland, had appeared on a Marshall's list of guaranteed loans (A 451-53, 456).

The heart of this aspect of the case, as it went to the jury, was how the labor union officials had come to receive their Homex stock, whether David Stirling had guaranteed the loans made to the union officials, and whether defendants had made payments on the loans at Central Trust. The case against defendants on these issues was largely decided by essential witnesses which the prosecution did not call, a key defense witness who was not permitted to testify, and a disputed letter (GX 291 [E 418]) which even the prosecution's expert conceded to be a possible forgery.

Of the six labor officials who were called by the prosecution, five explicitly stated that they had no discussion with either the Stirling brothers or Mr. Yanowitch about purchasing Homex stock (A 182-84 [Livingston]; A 198-99 [Marsh]; A 201-02 [Jacobs]; A 205-06 [Konyhal]; A 209-10, 211-12 [Catalfano]). Only Samuel Ruggiano testified to any contact with the Stirlings about the stock, and his testimony made no reference as to whether

the Stirlings' suggestion that "I ought to buy in" related to the initial issue, the aftermarket, or three years later (A 187-88).^{*} Moreover, Ruggiano himself testified that he had had no dealings with either David or William Stirling in connection with Homex stock, that he did not even know Harold Yanowitch, and that his decision to purchase the stock had largely been based upon his experience with the Homex product -- "it was the finest" (A 193, 201-02). Significantly, not one of these labor officials claimed to have given Homex any special treatment by reason of such stock ownership (A 183, 190-91, 202, 203-04, 208).

To the extent that any of these union officials had any dealings with Homex executives in regard to stock ownership, they were confined to Frank Csapo, a vice-president in charge of production (A 185-86, 189, 194-98, 207). The testimony of prosecution witnesses Catalfano, who has asked Csapo to put him in on the initial offering, hardly suggested any impropriety: "at one time he indicated that he thought we were going to get it. Then he said, 'I'm sorry, I can't promise you nothing'" (A 207). Moreover, David Stirling testified that he had never instructed Csapo to offer Homex stock to union officials (A 453). Significantly, the prosecution never called Csapo as a witness, despite his central role in the testimony of the union officials

^{*}The equivocal nature of Ruggiano's testimony at A 187-88 should be compared to the prosecution's rebuttal summation, which contained the statement that

"William Stirling was active in the plant. You can see that partially from the fact that Samuel Ruggiano testified that he had a conversation with William Stirling and David Stirling about buying

[Footnote continued on following page]

who took the stand.

To fill in this gap, the prosecutor relied upon the testimony of rebuttal witness Kheel, who claimed that while he had designated various union officials as recipients of Homex stock at the initial offering price, none of them had been members of the Carpenters union (A 479-80). He also denied having had any discussions with David Stirling about such designations, and claimed to have no knowledge of the purchases made by Messrs. Campbell, Livingston, Ruggiano, Konyha, Marsh, Jacobs and Catalfano (A 480-83). However, he admitted that he had arranged for the purchase of several thousand shares of Homex' stock for some undesignated "friends" (A 489-90; E 491). These, however, did not include Joseph Lane Kirkland -- one of the purchasers whose loan was allegedly guaranteed by David Stirling -- or Peter Turzik, who he recalled as "an official of the carpenter's union who retired. . .some time in this period. . ." (A 488, 490-92).

Kirkland, called by defendants in surrebuttal, testified that Kheel had not only arranged for the purchase of his Homex stock -- after receiving Kheel's assurance that it would not be a conflict of interest -- but had executed a blank promissory

[Footnote continued from preceding page]

Stirling Homex stock; that they were urging it on him, pushing it on him, back in the spring of 1970." (A 556e-f)

The "push" came from the prosecutor's zeal, not Ruggiano's testimony, and if it came in the Spring of 1970, it was certainly not an invitation to get in on the original issue of February 19, 1970.

note for the purchase price in Kheel's office (A 495-500; GX 866).*

When this note was filled in, the purchase price -- \$58,300 -- was equal to the note allegedly guaranteed by David Stirling (GX 291 [E /

On cross-examination, Kirkland admitted that he had never been a member of the Carpenter's union (5485). In summation, the prosecution made this fact the cornerstone of Kheel's credibility, inviting the jury, "if Mr. Gaynor [Stirlings' trial counsel] stands up here and starts looking at you in the eye and talking about Lane Kirkland", to tell him that Kirkland was not in the Carpenter's union (A 552-53).

Of course, the prosecution could afford to engage in this type of bravado because the trial court had refused to let Peter Turzik, a carpenter's union official, testify in surrebuttal that, contrary to Mr. Kheel's recollection, he also had been designated by Kheel for the Homex stock offering (A 493-94).

With respect to the alleged guarantee of the Carpenter's union loans, Marshall testified that David Stirling had asked him to lend some individuals money for the purchase of the Homex stock, which loans he would personally guarantee (A 325, 331). Of course, Marshall had not always been so certain of this fact: in his testimony before the SEC, Marshall had denied that Stirling or Yanowitch had given him any guarantee for the loans, and merely

*Kheel had admitted that when he joined the Homex board he had "sort [sic] out Mr. Kirkland [an AFL-CIO official] to speak to him about the question of the attitude of the building trade towards manufactured housing", and Kirkland had introduced him to the president of the Carpenter's union (A 486-87).

said that "Probably one of them called me and asked me to loan so-and-so money and I said yes." (A 333-34, 339). The handling of the loans had been most peculiar, since the earliest written evidence of the presentation of those loans for approval were the minutes of the Executive Committee's weekly meeting of January 26, 1971, more than ten months after the alleged phone call between David Stirling and Marshall (A 341-342, 344; GX 1043). Marshall did not attempt to explain such tardiness, nor did he account for the fact some the of the loans were not even evidenced by signed promissory notes (A 343-44). As the inconsistencies piled up Marshall admitted that he did not know the details of how the loans had been processed, because another Central Trust officer, Donald Sasso, had taken care of the loans and "is the one who has all these details and knowledge" relating to David Stirling and Yanowitch's involvement in their processing (A 335-37). However, Marshall had not made any effort to find out about these facts from Sasso, and the prosecution never called Sasso as a witness.

However, the prosecution did produce a guarantee letter, dated June 26, 1970, in which David Stirling purportedly guaranteed payment of the Catalfano, Jacobs, Kirkland, Konyha, Marsh, Livingston, Campell and Ruggiano notes (E 418). Aside from the fact that Marshall initially did not recall even the existence of the letter in his 1972 SEC testimony, he was uncertain as to whether he or Mr. Sasso had received it, or whether "Mr. Sasso ever ha[d] anything to do with [it]." (A 335, 338, 340). The

only persons who approached that letter with any certainty were David Stirling, who denied having signed it, and defense expert Felix Klein, who testified that the purported signature was a forgery (A 428-34, 458). Neither the denial nor Klein's expert testimony were rebutted, as prosecution expert Charles Spitzer testified that he was unable to determine whether or not David Stirling had actually signed GX 291 (A 478).

Finally, the prosecution maintained that the Stirlings and Yanowitch had made interest and principal payments on the notes by having Homex chauffeur William McCann cash checks issued for phony expense vouchers, returning the cash to Mr. Yanowitch, and then having the cash deposited at Central Trust. However, McCann's own testimony was quite precise -- he brought the cash back to Mr. Yanowitch -- and neither he nor anyone else testified that the cash was then brought back to Central Trust for deposit against the loans (A 174). It is interesting that while the government's theory could have been bolstered by the testimony of Central Trust's note teller, who would presumably have remembered such an unusual series of deposits, the note teller -- like Csapo and Sasso -- was never called to testify.

Mississippi Sales

By far the most inflammatory part of the prosecution's case was devoted to Phillips' alleged forgery of a \$15 million commitment letter, dated February 22, 1971, from the Farmers Home Administration ("FMHA") to the Greater Gulf Coast Housing Development Corporation ("Greater Gulf"), in connection with Greater Gulf's purchase of 800 Homex modules (GX 112C [E 408]).* Philips testified that he did not know that the signature of William T. Richardson, FMHA's assistant state director for Mississippi was not genuine. Richardson, recanting his testimony before the SEC, stated that Phillips had told him that he had induced his secretary, Nelda Wood, to sign Richardson's name to the letter because Yanowitch was pushing him "to get some letter back up to them that was going to be placed in the files and would never be seen." (A 316).** Curiously, most of the case against Yanowitch centered around the fact that the letter was seen by Homex's auditors and creditors, who used it to confirm the validity of the sales booked to the Greater Gulf project.

* Greater Gulf had been incorporated in December 1970, and had immediately entered into a contract for the purchase of 5,000 Homex modules, which were to be built in a factory constructed in Mississippi. Much of the case against Phillips was directed at the execution of a second 5,000 unit contract which deleted the clause requiring manufacture in Mississippi. Of the sales charged to Greater Gulf's 800 unit contract, none of the 5,000 units covered by such contracts were reported in Homex's sales, and did not play a material part in the case against David Stirling or Yanowitch. None of the Mississippi transactions were ever connected with William Stirling.

** Nelda Wood, testifying on behalf of Phillips, denied having signed Richardson's name to the letter (A 477). Additionally, Phillips' expert witness testified that Richardson's signature was either genuine or a most skillful forgery (A 476).

There was no evidence connecting William Stirling with any of the Mississippi transactions, and the inference that David Stirling knew that the letter was suspicious was based largely upon Marshall's statement that he had been told by Stirling and Yanowitch that he was not to leave a copy of the letter at Chemical Bank when he went there to arrange financing for the Greater Gulf project on March 23, 1971 (A 329-30).^{*} Of course, the prosecution never bothered to explain why, if the letter was suspicious, David Stirling would have permitted its widespread dissemination. No reasonable person could expect to cover up a \$15 million forgery, and the evidence educed permitted, if not compelled, the conclusion that either the letter was genuine or, if not, that David Stirling had been duped by Phillips.

^{*} Marshall's testimony must be considered in light of his acknowledged relationship with Chemical Bank, which had forced the Stirling brothers to resign from Homex shortly prior to the Chapter X petition and had replaced them with Marshall and Paul Kuveke. The trial court precluded the Stirlings' counsel from attempting to cross-examine Marshall about his relationship with Chemical to demonstrate his bias (A 326-27, 328).

Accounting Practices

The weakest part of the prosecution's case against the Stirlings and Harold Yanowitch was its attempt to connect them with an alleged failure to disclose misleading accounting practices to Homex's auditors (Ind., ¶¶13, 15 [A 15-16]). As the case developed, it soon became clear that none of these defendants, who had disclaimed any accounting expertise and had sought out the most reputable accountants available, had either sponsored or initiated these practices. Indeed, even as to the principal defendant on these charges, Homex's vice-president and controller Edwin A. Schulz, the evidence generally indicated that the practices -- principally the reassignment of modules between projects -- were neither misleading nor undisclosed.

The prosecution charged that defendants (other than Phillips) had falsely represented in its SEC filings that it recognized income when modules were assigned to a specific contract, when "the defendants well knew, such assignments had been repeatedly cancelled or revised with modules then being reassigned from project to project. . ." (Ind., ¶13 [A-15]).* This was hardly misleading: the bulk of the reassignments took place within the same quarterly reporting periods, and prosecution witness

*Of course, the falsity of such representation could only be assumed if the word "assigned" were held to imply irrevocably assigned. The simple fact that modules previously assigned to one contract would be taken off that contract and assigned to another contract (as would happen when it appeared likely that the latter project would be completed sooner than the first) does not mean that Homex's sales figures did not reflect "assigned" modules.

Mauriello testified that, from an accounting standpoint, the company could properly wait until the final day of such period to decide which module was assigned to which contract (A 368).

Most importantly, there was no evidence that either the Stirlings or Yanowitch had ever misled Homex's auditors as to the existence of such reassignments. Indeed, prosecution witness Donald Kesel testified that the Peat Marwick auditors had seen all of the entries relating to assignments, and that each entry involving a reassignment had an explanatory footnote stating that it was a reversal of a previous assignment (A 345-47).*

The balance of the indictment charged that Homex had overstated its 1970 earnings by failing to include approximately \$500,000 in estimated cost overruns, had improperly recorded a \$300,000 fee due from Greater Gulf to U.S. Shelter, Homex's financing subsidiary, and the inclusion of an \$832,000 expenditure

*The prosecution claimed that, notwithstanding the journal entries, Peat Marwick had been misled because Homex's Operations Control Department used two different computer runs, denominated "File 1" and "File 2", to keep track of its module inventory, and the former was never supplied to Peat Marwick. Aside from the fact that neither the Stirlings nor Yanowitch had any connection with these files, they were not the "double set of books" which the prosecution claimed. File 1, never shown to Peat Marwick was a working file which was duplicative and unwieldy, in large part because the modules were given different serial numbers by different Homex departments at different times (A 372-73, 376-80). For auditing purposes, File 1 was useless, because it did not indicate the contract number of modules which had been assigned to a "general" site plan. File 2 would show the contract for such assignments (A 374-75). Peat Marwick in using File for its physical inventories, was aware that the assignments included those which had been made to general site plans (A 409).

recorded in connection with the preparation of the Mississippi plant which was never built (Indictment, ¶15). The testimony offered by the prosecution did not support these charges.

The critical testimony supporting the allegation relating to the cost overruns was Schulz's grand jury testimony in which he stated that he had told his subordinate, David Christman, to enter the overruns against the succeeding fiscal year. (A362-66). The testimony did not intimate that the Stirlings or Yanowitch had been aware of Schulz's decision, nor that it had ever come to their attention. Likewise, the U.S. Shelter fee was only improper if the Stirlings and Yanowitch knew that the Farmers Home commitment letter was a forgery -- a fact which was hotly contested at trial by both expert and lay witnesses. Finally, prosecution witness Murray, the Peat Marwick partner in charge of Homex's 1971 audit, testified that the expenses charged for the proposed Mississippi plant were entirely proper (A 400-01, 420).

I

THE TRIAL COURT'S REFUSAL TO STRIKE
PARAGRAPH 16 OF THE INDICTMENT VIO-
LATED DEFENDANTS' RIGHTS UNDER THE
FIFTH AMENDMENT AND DEPRIVED DEFEN-
DANTS OF A FAIR TRIAL

Prior to trial, defendants David Stirling and Harold Yanowitch unsuccessfully moved to strike paragraph 16 of the indictment, which related to the purchase of Homex stock for officials of the United Brotherhood of Carpenters and Joiners of America (A 24-32). Five months prior to the indictment herein, David Stirling had pleaded guilty to three counts of a Western District of New York indictment which had covered all of the transactions offered under paragraph 16, and had been sentenced (A 53-72, 75). The trial court's failure to strike this paragraph violated fundamental rights, guaranteed to the Stirling brothers by the Fifth Amendment, the privilege against self-incrimination and, as to David, the prohibition against double jeopardy. Even more basically, this part of the case could never have been proven, in fact never was proven, and only served to inflame the jury by the injection of what the Court itself characterized as "a separate substantive item in a case of this nature" (A 473).

Paragraph 16 charged, in full text, that:

"16. It was further a part of said scheme to defraud that on or about July 29, 1971, defendants DAVID STIRLING, JR., WILLIAM G. STIRLING, and HAROLD M. YANOWITCH prepared and filed with the SEC registration statements [the Merrill Lynch prospectus] and other reports which described Homex's several relations with the United Brotherhood of Carpenters and Joiners of America and its locals. Those statements were materially

false and misleading, because as the defendants well knew, but failed to disclose, seven members and officials of the United Brotherhood of Carpenters and Joiners of America had been paid off by having approximately \$240,000 worth of Homex common stock purchased for them at approximately \$76,800 less than the fair market value, and afterwards, when the fair market price had fallen, approximately \$64,000 worth of Homex common stock sold for them at approximately \$136,000 above the market price." (A 17)

In essence, the prosecution contended that purchasers of Homex's preferred stock should have been advised that its peaceful labor relations were predicated on bribes to union officials, lest they assume that Homex would be free of labor strife because of its existing contracts.

This argument should never have been permitted, since no investor could have reasonably relied on such continued harmony in light of the statements in the Merrill Lynch prospectus that Homex's present collective bargaining agreement would expire within two months, and that "while it does not expect any difficulty in negotiating such [new] contract, it can give no assurance in this connection." (GX 12 [E 135]). Furthermore, putting aside the patent lack of materiality, the evidence offered by the prosecution at trial failed to bear out the allegation: not one scintilla of evidence that Homex enjoyed labor peace because of these alleged pay-offs, their disclosure in a prospectus would probably have been more misleading than their omission.

Moreover, the prosecution of the Stirlings for having failed to make such disclosure violates the principle, espoused in Marchetti v. United States, 390 U.S. 39 (1968), that the Fifth Amendment precludes prosecution for failure to disclose such conduct as would subject the person making such disclosure to criminal prosecution. In the

Marchetti case, defendant had been convicted of willful failure to pay the federal wagering tax, failure to register, and conspiracy to evade payment of the tax. This Court rejected Marchetti's claim that the statutory obligation to register and pay the tax violated his privilege against self-incrimination. See 352 F.2d 848.

The Supreme Court, in reversing this Court, noted that the effect of the registration requirement was nothing less than a mandate to expose himself to criminal prosecution:

"[Marchetti] was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt."

--390 U.S. at 48
(footnotes omitted)

See also Grosso v. United States, 390 U.S. 62 (1968).

The Stirlings' predicament, vis-a-vis the alleged pay-offs to union officials, is no different than Marchetti's predicament: if he were to disclose such payments, he would be prosecuted under the Taft-Hartley Act or numerous state statutes relating to commercial bribery; because he did not disclose such payments, he has now been convicted of violating the Securities Act and the mail fraud statutes.

The irony of such a result in this case is even more striking, however, because David Stirling has already been punished for such Taft-Hartley violations in the Western District of New York, under an indictment which covered the same transactions and individuals educed at trial with respect to para-

graph 16 of this indictment. By permitting the jury to deliberate over these charges, the trial court placed David Stirling within "the classic mold of being twice placed in jeopardy for the same offense." (United States v. Jorn, 400 U.S. 470, 488 (Burger, C. J., concurring). cf. United States v. Mallah, 503 F.2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1976)).

Given the dubious materiality of the alleged non-disclosure and the palpable danger to David Stirling's Fifth Amendment privileges, the trial court should have stricken paragraph 16 prior to trial. Indeed, by denying the motion to strike, the court permitted the prosecution to introduce a peculiarly inflammatory matter into this case -- not a fraud against the purchasers of Homex stock, but a crime against labor; not an inflation of Homex's reported earnings, but the evil acts of its bribe-giving principals; not a failure to disclose past losses, but an alleged failure to account for its successful labor relations. Under these circumstances, the charge relating to the alleged payments to union officials should have been stricken. See, e.g., United States v. Saporta, 270 F.Supp. 183 (E.D.N.Y. 1967); United States v. Bonanno, 177 F.Supp. 106 (S.D.N.Y. 1959).

II

THE COURT'S CHARGE TO THE JURY WITH RESPECT TO RELIANCE UPON EXPERTS WAS ERRONEOUS

In large part, the specifications alleged against the Stirlings turned upon their sophistication rather than their honesty. Thus, the issues framed by the prosecution, insofar as they related to the land transactions, turned upon such abstruse questions as whether Homex and 57 & 31 Corporation were "indirectly related" because of the assignment of the condemnation award. Likewise, the charges relating to the Raseac transaction, even if all issues of credibility were resolved against the Stirlings, would turn upon whether Yanowitch's alleged oral assurances, unenforceable in any court in this state, were binding agreements to the SEC. Similarly, the determination of specification 13 centered around Schulz's understanding of the term "reassignment", and whether that interpretation was shared, or even understood, by the SEC.

To be sure, all of these and other issues might have been immaterial if the testimony had not pulled the jury into areas requiring some degree of legal and financial sophistication, or if the Stirlings had held themselves out as skilled accountants, securities lawyers, or labor experts. But the Stirlings never claimed to have that expertise -- neither of them had proceeded past the tenth grade, and their success prior to Homex had given

no indication that they had acquired any special skills aside from buying property and building homes.

From the start, Homex sought out and retained the acknowledged experts in their respective fields, such as Theodore Kheel, Allan Kramer, Harris Kerr Forster, and, subsequently, Peat Marwick Mitchell. The record is devoid of any instance where the Stirlings did not follow the recommendations given to them by their outside experts, or any testimony that they were denied access by the Stirlings to any materials or information they had requested. Instead, the prosecution's case largely centered around the testimony of Messrs. Kramer, Murray, Mauriello and Kheel that their opinions were based on facts which had not been disclosed to them and that, had they known such facts, they would or might have given different opinions.

This sort of testimony hardly meets the issue posed by the scienter requirements of the statutes under which the Stirlings were tried. If they had candidly and truthfully answered every question asked of them by their experts, who presumably knew what questions had to be answered, they were entitled to rely on those answers unless they were so patently erroneous as to permit the jury to speculate on the Stirlings' good faith in relying upon them.

Unfortunately, the charge to the jury did not reflect the possibility that the Stirlings had either fallen into the hands of experts whose professed ignorance resulted from their own

failure to seek the information they required, or to conform to professional standards with respect to SEC matters or proper auditing procedures. Rather than giving the charge requested by both the Stirlings and Yanowitch, the trial court charged, with respect to reliance upon expert opinion, that:

"If an attorney or accountant has a full account of the facts of what you are doing and what you intend to do is proper, it is lawful, your proceeding on that basis might serve as a strong indication that you were acting in good faith and not in bad faith.

"On the other hand, you will realize that if some of the important facts are misstated to the accountant or lawyer or if some of the important information is withheld or not disclosed, the advice that the accountant or lawyer then gives can hardly be deemed to constitute a basis for claiming good faith in going ahead and acting on the basis of that uninformed and insufficiently implemented advice." (A 601-02)

This excerpt, the only portion of the charge addressed to reliance upon experts, failed to encompass the possibility that the "important information" which the Stirlings did not disclose was not "withheld," except in the sense that neither Allan Kramer, Peat Marwick, nor Theodore Kheel -- a Homex director before the company went public -- simply

* With respect to reliance on experts, the Stirlings and Yanowitch had jointly requested the following charge:

"You should ask yourself whether it would be likely that he would have personal knowledge of the fact he related or whether it was more likely that he obtained his information second-hand in reliance on the statements and opinions of others who were closer to the pertinent affairs of the company. For example, even if you find that a financial statement which a defendant mailed, or caused to be mailed, was false as charged, if you find that the defendant relied in good faith on the expertise of the accountant who furnished the statement and that he therefore personally believed the statement to be truthful, you must acquit the defendant charged with fraud in that instance. "

-- Request No. 21
(A 145)

did not bother to pose the questions that should have been asked.

As the case was thus sent to the jury, it is likely that they could have completely disregarded the Stirlings' professed reliance simply because the persons they relied upon had, unknown to the Stirlings, done shoddy work. It is submitted that such an instruction was erroneous and highly prejudicial. See, e.g., United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), cert. denied subs. nom. Mittelman v. United States, 368 U.S. 984 (1962).

In the Crosby case, this Court reversed the conviction of brokers who had relied upon the advice of securities counsel in connection with the sale of unregistered securities, even though the attorneys giving the opinion had not been given all the facts essential to its determination. This Court, in terms equally applicable to the case at bar, noted that:

"The statutory and administrative regulatory scheme over this area is far from a model of clarity; such a situation is aggravated when, as here, criminal liability is based on the failure to comply with the law. We think it is all too facile an answer for the government to rely on the experience and supposed expertise of these brokers; the fact is that they purported to rely on opinion letters of an attorney, whose expertise is presumed to be even greater."

-- 294 F.2d at 942

In its charge, the district court apparently relied (at the prosecution's suggestion) upon this Court's statement in United States v. Falcone, 544 F.2d 607 (2d Cir. 1976), a bankruptcy fraud case in which defendants, in 1974, had entered a false credit against a customer's account as a rebate for defective, "fishy"-smelling

cheese which had been delivered to the customer no later than December 1971. In responding to defendants' argument that they could not possibly be convicted because their attorney and their accountant had both told them "that it would be permissible to take a credit in 1974 for deliveries of foul cheese made in 1971", this Court wrote:

"Appellants do not question the correctness of the court's jury instruction that appellants' reliance upon expert advice should be considered a circumstance disproving fraudulent intent only if the jury found that the advice was given after full disclosure of all relevant and material facts."

-- 544 F.2d at 610, n. 6

Of course, in the Falcone case the "relevant and material fact" was that the "fishy cheese" story was a complete fabrication.

It is patently clear that holding the Stirlings to the standard imposed by the charge -- all of the "important information" must be disclosed or there can be no good faith reliance -- is unrealistic in an area where skilled accountants, lawyers, and SEC Commissioners often differ amongst themselves as to what constitutes "important information." It totally discounts the possibilities of both innocent misstatement or omission, or professional neglect. In the circumstances of this case, where two high school drop-outs followed every suggestion given to them by their experts and answered every question posed to them, the court's charge was erroneous and prejudicial.

III

CERTAIN SPECIFICATIONS WERE UNSUPPORTED BY
THE EVIDENCE AND/OR BARRED BY THE FIFTH
AMENDMENT, AND SHOULD HAVE BEEN WITHDRAWN
FROM THE JURY'S CONSIDERATION

At the conclusion of the case, David Stirlings' counsel submitted a supplemental request to charge, which requested an instruction prohibiting the jury from considering the Raseac sale with respect to paragraphs 10 and 11 of the indictment, and withdrawing the charges relating to the reassignment of modules (paragraph 13), the Greater Gulf sales (paragraph 14), and the income misstatements relating to installation revenues, U. S. Shelter's fee in connection with the Greater Gulf transaction, and the deferred general administrative expenses charged against the construction of the Mississippi plant (paragraph 15). This request was based on this Court's decision in United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), cert. denied 425 U.S. 934 (1976).*

The trial court denied this request, ruling that

"... the particular kind of specifications of falsity that [Natelli] seems to require or favor should be given with respect to count 2 [false statements in the Merrill Lynch prospectus] and not otherwise.

*No supplemental charge was submitted on behalf of William Stirling. However, a detailed motion for acquittal was made with respect to this defendant at the close of the prosecution's case, and was again reviewed at the conclusion of the case (A 421-22, 501-02). It is submitted that these motions, together with his co-defendants' request for such instructions, were sufficient to alert the trial court to William Stirling's desire that certain, if not all, specifications be withdrawn from the jury's consideration. See United States v. Natelli, supra, 527 F.2d at 329.

"Now, I will from time to time try to remind the jury that they have to look at each individual defendant and be aware of the fact that in terms of the indictment certain defendants are not even charged in connection with certain transitions. I think that applied to Mr. Phillips and Mr. Schulz, I guess only to them, and you all know which paragraphs that thought relates to." (A 548)

By refusing to withdraw these specifications from the consideration of the jury, the trial court may well have permitted the jury to convict David and William Stirling on specifications which should have been dismissed for insufficient evidence.

In the Natelli case, this Court held that one of two specifications alleged against Scansarola was not supported by sufficient evidence, and that his conviction under the false statement statute (15 U.S.C. §77ff(a)) could not be sustained merely because the other specification was amply supported by the record:

"Inasmuch as the evidence was sufficient to support [co-defendant] Natelli's conviction on either specification, the charge presents no problem to affirmance as to him.

"A difficulty does arise, however, if it is found as a matter of law that there should have been a directed verdict for a defendant on one of the specifications for insufficiency of evidence. The verdict then become ambiguous, for the jury could have rejected the specification which the appellate court holds sufficiently proved, and have convicted only on the specification held to be insufficiently proved. In that event, there seems to be no alternative to remand for a new trial. That is the general principle. Yates v. United States, [354 U.S. 309 (1957)]; Stromberg v. California, 283 U.S. 359, 367-68, 51 S. Ct. 532, 75 L.Ed. 1117 (1931)."

--527 F.2d at 325

See also, Street v. New York, 394 U.S. 576, 585-86 (1969); Cramer v. United States, 325 U.S. 1, 36, n. 45 (1945); Williams v. North Carolina, 317 U.S. 287, 292 (1942); United States v. Johns, 444 F.2d 58 (5th Cir. 1971); United States v. Cox, 432 F.2d 1326 (D.C. Cir. 1970); United States v. Guterma, 281 F.2d 742, 747-48 (2d Cir.) cert. denied, 364 U.S. 871 (1960).

In this case, the prosecution had utterly failed to prove the Stirlings' involvement in the Raseac transaction. Indeed, if prosecution witness Frank's testimony is to be credited, David Stirling's alleged shock at Falcone's change of heart indicates a good faith belief that a year earlier a bona fide sale had been made. Likewise, there was no palpable evidentiary basis for permitting the jury to consider whether he had hidden anything from Homex's auditors or the SEC by reason of the reassignment of modules, or the accounting treatment accorded by Schulz to the installation cost overruns or the deferred general and administrative expenses incurred in connection with the Mississippi plant. (Indictment, ¶¶13, 15 [A 15, 16]). The balance of the charges against David Stirling turned upon sharp issues of credibility upon which reasonable men may well have differed.*

As to William Stirling, the need for a Natelli instruction was even more compelling. As shall be demonstrated in Point V, supra, there was a blatant failure of proof against him with respect to any of the specifications.

*Although David Stirling's Natelli charge did not request withdrawal of paragraph 16, relating to stock purchases for union officials, that specification should properly have been withdrawn prior to trial by reason of the Fifth Amendment considerations set forth in Point I, supra.

In charging the jury, the trial court gave the instruction that before defendants could be convicted on the false statement count, they must find that the prosecution had proven at least one of the misrepresentations alleged in paragraphs 10 through 16 (A 595-96). The court did not protect defendants against the distinct possibility that they could be convicted on a specification which had not been supported by sufficient evidence. It is submitted that the Natelli decision codemns this result, and requires a reversal of the judgment of conviction.

IV

DEFENDANTS WERE DEPRIVED OF A FAIR TRIAL BY
REASON OF THE COURT'S GRATUITOUS SUGGESTION
OF PERJURY DURING ITS CHARGE, EXCLUSION OF
DEFENSE WITNESSES, AND ITS LIMITATION OF THE
CROSS-EXAMINATION OF PROSECUTION WITNESSES

No one will argue that, in the course of a long trial involving complex and technical issues, even so able a district judge as the court below may err without prejudicing a defendant's right to a fair trial. However, in at least three respects, the Stirlings were deprived of that right by the trial court's comments and rulings: its gratuitous assurance to the jury that perjury had been committed, its refusal to permit defense witnesses Turzik and Wind to testify, and its restriction of defendants' cross-examination of prosecution witnesses with regard to practices germane to Homex's business.

In conformity with its prior discussions with counsel, the trial court did not marshal the evidence in its charge (A 216, 410-12). Towards the end of its charge, however, the trial court issued what would amount to a broadside against the three defendants -- David Stirling, Harold Yanowitch and Rubel Phillips -- who had taken the witness stand. At the outset of his discussion of the black-letter law regarding the credibility of witnesses, the trial court charged that:

"Now to go to a subject much less technical and perhaps much more critical in the end, the subject of credibility of witnesses. That is a key problem for juries. I think it is reasonably safe to suggest that you probably heard more than once perjury from the witness stand in this case. Beyond that, of course, you have heard lots of conflicting statements about what happened or didn't happen, about what was said or was not said, and you are relying on the net effect of those witnesses in the last analysis

"for your discovery of the truth, for your accurate recreation of the events upon which you will base an accurate and just decision, and that is the problem of credibility." (A 657; emphasis added)

Shortly after this gratuitous reference to perjury, the trial court underscored the implication that the unnamed perjurers to whom he had referred were the defendants. Thus, he told the jury that

"Among interested people who testified you have heard three of the defendants themselves, and you would know without my saying that a defendant in a criminal case has a deep and profound and abiding interest in the outcome of that case. Obviously that is among the factors you will take into account in appraising the credibility of those witnesses." (A 659-60)

To further underscore this contrast, the trial court emphasized that witnesses who had been the recipients of promises of immunity would be especially trustworthy as witnesses:

"In considering whether they may have sworn falsely in this respect, you may also take into account that the cases at least where immunity has been granted, the immunity has been conditioned on the undertaking of the witness to tell only the truth here and elsewhere with the stipulation that the immunity would end if the person was deemed to testify falsely, and you may weigh that with and against the several other things that I have mentioned." (A 660-61)

Even without these reminders, the trial court's suggestion that a crime had been committed on the witness stand was highly unfavorable to the defendants. In its initial summation, the prosecution had itself invited the jury to "resolve the fact question, which is your job, as to whether or not Mr. Marshall's interest in the outcome of this action or Mr. Stirling's interest

in the outcome of this action might suggest some motive to fabricate." (5581). Likewise, at every opportunity, the prosecutor had introduced the fact that his immunized witness was free from prosecution only insofar as he testified truthfully, and that such immunity would be revoked in the event that they made any false statements in this proceeding. (A 298-99 [Frank], 317-19 [Richardson], 344a-b [Booth], 361 [Mauriello], 474 [Woods]). Defense counsel, of course, could offer no such certification for their own witnesses' veracity.

It is fundamental that a defendant in a criminal proceeding is entitled to the presumption of innocence. When the trial court sua sponte suggested that someone, probably defendants, had perjured themselves, that presumption was lost. See, e.g., United States v. Cisneros, 491 F.2d 1068 (5th Cir. 1974) (trial court's comments on credibility, including statement that "somebody is lying," held reversible error).

Likewise, the trial court prejudiced defendant's case by excluding two key witnesses, Daniel Wind, an official of the State of Israel who had flown to New York to testify, and Peter Turzik, a former official of the Carpenter's Union. In a trial where the bona fides of Homex's practices with respect to recognizing income was a central issue, Wind would have testified that in late June of 1972, the State of Israel was "ready, willing and able to negotiate the final price" --approximately \$2.5 million-- for a shipment of 500 modules which

had already been produced. Counsel for the Stirlings offered this testimony to dispel the prosecution's suggestion "that there were few if any viable projects in the works at that time," shortly before the Stirlings and Yanowitch were asked to resign by Homex's creditor banks (A 469-70). Similarly, the trial court refused to permit Turzik to testify, as a surrebuttal witness, that the prosecution's star rebuttal witness, Theodore Kheel, had lied in his testimony when he claimed that he had never arranged for the purchase of Homex stock by Carpenter's Union officials (A 494). As previously noted, the prosecution's summation unfairly focused on the fact that the defense had been unable to call any Carpenter's Union officials to rebut Kheel. See p. 27, supra.

Similarly, during the course of the cross-examination of prosecution witness Joseph Griffin with respect to the Greater Gulf issues, the trial court abruptly instructed Yanowitch's counsel to refrain from asking the witness whether certain critical practices engaged in by Greater Gulf "were usual" or "were unusual" (A 323-25). This was not the first time the court had restrained counsel from eliciting, for the benefit of the laymen of the jury, an experienced specialist's understanding of standard practices. See, e.g., A 320-322. The effect of this ruling, however, was highly prejudicial, since it effectively precluded defendants from demonstrating, at a key stage of the proceeding, the bona fides of Homex's activities in Mississippi. The trial court itself noted, with its characteristic candor, that "If this [cut-off] is erroneous it is not

harmless [error]" (A 324). We respectfully submit that his assessment was correct. See, e.g., United States v. Wolfson, 437 F.2d 862 (2d Cir. 1970).

V

WILLIAM STIRLING'S MOTION FOR A JUDGMENT
OF ACQUITTAL SHOULD HAVE BEEN GRANTED OR,
ALTERNATIVELY, HE SHOULD BE GRANTED A NEW
TRIAL BY REASON OF THE PROSECUTION'S IM-
PROPER REBUTTAL SUMMATION

The paltry evidence presented against William Stirling fully warranted the entry of a judgment of acquittal, which was sought at the close of the prosecution's case, at the conclusion of its rebuttal, and by motion after trial (A 421-27, 501-02; A 161). In a case where the prosecution introduced approximately a thousand exhibits, marched forty-one witnesses to the stand, and promised immunity on a broad scale, the case against William Stirling amounted to little more than the fact that he was president of Homex, that he reviewed certain documents, and, ultimately, that he signed Homex's registration statement.

Significantly, there is not a single piece of evidence, direct or circumstantial, to indicate that he initiated or knowingly participated in any scheme or artifice, or that he ever attempted to become involved in the financial dealings of Homex. He was, for aught that appears, nothing more than the head of production at Homex, a craftsman whose talent ran to assembling prefabricated homes with cranes, rather than the alleged fabricating of financial statements.

This failure of proof is perhaps best summarized in the prosecution's rebuttal summation (A 556a-h), a remarkable speech which not only summarizes every single contact between this defendant and

the issues -- even McCann's use of his wife's station wagon -- but also adds a few things which, albeit prejudicial, have nothing to do with the charges against him. We invite the Court's careful review of that summation, not only because it was in and of itself highly improper, but because it illustrates the insufficiency of the evidence against William Stirling.

The rebuttal began by reminding the jury of Homex's 20-minute promotion film, "It Can Be Done", an innocuous documentary which described the manufacture and on-site installation of a module house.* The sinister part about the film -- whose production William Stirling had approved -- was:

"...that film was used for much more than [sales promotion]. You remember Mr. Clayton [administrative assistant to David Stirling] saying that it was shown to securities analysts, prospective investors, bankers, people in the financial community. When you deal with them you have a responsibility to say more about the company, to put out all the relevant and material facts so the public can see them, and William Stirling didn't make sure that that was done in that film. There is nothing in that film about the company's dealings in Mississippi." (A 556c)

Aside from the fact that Clayton only said that the film was shown to "all sorts of people that came to the plant" (A 434) --

* The trial court's brief review of this movie was "Look, everybody knows [about the modules because] we saw the movie. They are just nifty and everybody singing and most of them are black and all that. We know there were modules built." (A 433)

a phrase that would include just as many Cub Scouts as investment bankers -- no evidence was ever introduced to establish that "It Can Be Done" was intended to serve the function of a registration statement. His comments about the film were totally out of place and highly improper.

From the documentary, the rebuttal moved to the subject of Homex's press releases, which "were approved by William Stirling", and "deal directly with financial matters" but do not disclose the company's land deals or the Greater Gulf contract (A 556b-c). No evidence was offered to show that William Stirling ever wrote one word of those releases, that he even supervised or initiated their preparation, or that he had selected the topics to be covered. Indeed, prosecution witness Levering testified that the details of the Mississippi project contained in Homex's press releases came from Homex executive Carl Wren, and not William Stirling, who did not even receive copies of the public relations memos relating to the Mississippi project (A 369, 370-71).

Undaunted by the facts, the rebuttal summation next considered "the incident as to the financial reports...being sent to the typesetter", and returning with the deletion of a footnote regarding a tax net operating loss (A 556d-e). William Stirling was not charged with having suggested the deletion, nor even with knowledge that it was made, and no contention was raised at trial that anyone was misled by what the prosecution alone called "a much softer piece of language" which appeared in the annual report. However, because

William Stirling attempted to collect all of the drafts of the financial statement, the prosecutor charged that he "did everything he could to make sure that the decision [amending the footnote] was implemented." (A 556e) Since the record does not disclose who had asked him to collect the old drafts -- which were subject to review by Homex's auditors as well as its outside SEC counsel, it is impossible to attach any significance to such efforts.

The prosecution then moved swiftly through the remaining bits and pieces: his capital "S" on a copy of GX 807 (E 487), which contains no substantive comments attributed to him other than "O.K." in response to an inquiry as to whether it is "O.K. to mail" the information requested to Merrill Lynch and its attorneys; the transfer, with his brother, of their 12% interest in Hollyrood Park to Peter Thun, without any indication that he had any conversations with Thun or even knew what the prosecution mistakenly alleged to be the true purpose of the transaction; the alleged conversation with Ruggiano, which was blatantly misquoted in the summation (see pp. 24-25, supra); an unauthenticated expense voucher (E 432) with a capital "S" -- totally dissimilar from the "S" on GX 807 -- which the prosecution claimed to have traced to the union officials' loan accounts at Central Trust; and co-signing, again with his brother, the hold harmless letter for William Shea's takeover of the Central Trust loans -- a transaction for which David, but not William, had been indicted in the Western District of New York.

Not one of these acts, equivocal as they are, were shown to have been made by William Stirling with knowledge that they were part of the alleged scheme to defraud, nor is there any scrap of paper or piece of testimony to indicate that he had any interest in the machinations attributed to his co-defendants. This type of "proof" hardly serves as a basis for incarcerating a man with a hitherto unblemished reputation and four children.

Truly, the prosecution itself indicated the absurdity of its case against William Stirling when it sought to show how much money he had made at Homex, and ended up with the suggestion that

"You know, of course, that the expense accounts were not generally written out by William Stirling and David Stirling and there is a very real open question there as to how much more money really was being taken out through the expense accounts." (A 556g)

The reason there was "a very real open question" is because no evidence had been introduced at trial that David or William Stirling had milked the company through their expense account, and such charge was not contained in either the indictment or the bill of particulars. The introduction of this allegation, albeit a fitting close to this type of advocacy, was clearly improper and highly prejudicial.

Standing alone, there is enough misstatement and impropriety in the prosecution's rebuttal summation to warrant a new trial. See, e.g., United States v. Gugliemi, 384 F.2d 602 (2d Cir. 1967); United States v. Persico, 305 F.2d 534 (2d Cir. 1962). However, as a summary of the tenuous evidentiary basis of the case against William Stirling,

it serves as an ample demonstration that this defendant should have been acquitted, on motion, at the close of the government's case.

CONCLUSION

The judgments of conviction against defendants David Stirling, Jr. and William G. Stirling should be reversed, and the indictments dismissed or, in the alternative, a new trial ordered.

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Respectfully submitted,

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